



June 15, 1999

Mr. Edward H. Perry
Office of the City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR99-1668

Dear Mr. Perry:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 124941.

The City of Dallas (the "city") received a request for several categories of information concerning "Dallas City Council member Laura Miller." In response to the request, you submit to this office for review a representative sample of the information at issue, submitted as Exhibits B and C.¹ You assert that the submitted information is excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, 552.104, 552.105, 552.106, 552.107, 552.108, 552.109, 552.110, 552.111, and 552.117 of the Government Code.² You also claim that a portion of the requested information is "the personal property

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Therefore, in this ruling we only consider the exceptions for which you have offered support.

and records of Councilmember Miller, not records of the City.” We have considered the exceptions and arguments you have raised and reviewed the submitted information.³

Initially, we consider your assertion that Exhibit B constitutes “personal property and records of Councilmember Miller.” Section 552.021 of the act provides for public access to “public information.” Section 552.022 defines “public information” as “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . (1) by a governmental body” . . . or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” While Open Records Decision No. 77 (1975) found that personal notes made by individual faculty members for their own use as memory aids were not subject to the act, Open Records Decision No. 450 (1986) found that notes of appraisers taken in the course of teacher appraisals were public information. *See also* Open Records Decision Nos. 635 (1995) (public official’s or employee’s appointment calendar, including personal entries, may be subject to act); 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members public information); 145 (1976) (handwritten notes on university president’s calendar not public information); 120 (1976) (faculty members’ written evaluations of doctoral student’s qualifying exam subject to act); 116 (1975) (portions of desk calendar kept by governor’s aide and aide’s notes made solely for his own informational purposes not public information).

You explain that “Councilmember Miller buys these notebooks with her own money and does not reveal the contents to anyone else, including her City Staff. She has sole access to these notebooks and they are not maintained at City Hall.” Based on your representations, we conclude that *some* information within Exhibit B, consisting of the council member’s *personal* notes is not subject to the act. *See* Open Records Decision No. 77 (1975).⁴ However, most of the information in Exhibit B consists of “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of

³You have submitted one document which you purport to be “notes taken or information discussed in executive sessions of the City Council, authorized as closed sessions by the Texas Open Meetings Act, Chapter 551, of the Texas Government Code.” Section 551.104(c) of the Government Code provides that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3)*. (Emphasis added.) The document you have submitted is *not* “[t]he certified agenda or tape of a closed meeting.” Therefore, the document is not subject to exception under section 551.104(c), and we will consider your other arguments against disclosure.

⁴However, if information maintained on a privately-owned medium is actually used “in connection with the transaction of official business,” such recording would be subject to the act. *See* Open Records Decision No. 635 (1995).

official business.” See Gov’t Code § Section 552.022. Therefore, we conclude that most of Exhibit B is subject to the act, and we must consider whether your claimed exception under section 552.111 is applicable to the handwritten notes.

Section 552.111 excepts “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” As elaborated further below, section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the *policymaking processes* of the governmental body. See Open Records Decision No. 615 (1993). We agree that section 552.111 protects the information in Exhibit B, which you contend is protected under the exception.

Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses both common-law and constitutional privacy. Under common-law privacy, private facts about an individual are excepted from disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation*. Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Although the city claims that a portion of the submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy, we do not find any information that is protected by privacy.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information

at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).⁵

In this instance, you have demonstrated that there is anticipated or pending litigation. After reviewing the submitted materials, we also conclude that some of the information at issue relates to the anticipated or pending litigation. Based upon your representations concerning the anticipated or pending litigation, we agree that the city may withhold the tagged information pursuant to section 552.103.⁶

As for the submitted litigation invoices, we conclude you have met your burden in establishing the relatedness of the descriptions of legal services rendered to the pending litigation. The city may therefore withhold this information from disclosure under section 552.103(a). You have not, however, shown how the amounts charged for services or the time spent performing services is related to the pending litigation and therefore, this information may not be withheld under the litigation exception. We have marked a representative sample of the type of information that may be withheld from disclosure pursuant to section 552.103(a).⁷

We will next address whether the other exception you raise applies to the amounts charged for services or the time spent performing services. Section 552.107 excepts information from disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client

⁵Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

⁶We note that among the records you have submitted to our office for review you included what appear to be documents filed with a court. We assume that the submitted pleadings were submitted to this office for informational purposes only. To the extent the submitted information has been filed with a court, it is part of the public record and must be released. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (orig. proceeding).

⁷We note that if the opposing parties in the litigation have seen or had access to any of the information at issue, there would be no justification for withholding that information pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. Section 552.107(1) does not protect purely factual information. *Id.* We conclude you have not demonstrated how the information in the submitted fee bills relating to the time spent performing services and the expenses incurred is privileged information. Therefore, you may not withhold this information under section 552.107(1).

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder."⁸ The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations, prior to the awarding of a contract. Open Records Decision No. 593 at 2 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation. Open Records Decision No. 541 at 4 (1990).

This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). A general allegation of a remote possibility that some unknown "competitor" might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 at 2 (1987). As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. *See* Open Records Decision No. 592 at 8 (1991).

You generally argue that section 552.104 applies because release of the requested information "would 'give advantage to a competitor or bidder.'" You have not demonstrated any potential specific harm to the city's interests in a particular competitive situation. *See* Open Records Decision No. 541 (1990) (discussing applicability of section 552.104 when private party may be harmed by release of bid information; opining that section 552.104 does not protect private bidders' competitive interests in marketplace); *see also* Open Records

⁸Section 552.104 is not applicable to protect the proprietary interests of a third party. *See* Open Records Decision No. 592 (1991).

Decision No. 593 at 2 (1991). And, you have provided nothing more than a general allegation of a possible advantage. We do not believe that in this case you have shown the applicability of section 552.104. See Gov't Code 552.301(b)(1); Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). The information may not be withheld under section 552.104.

You also assert that a portion of the requested information is excepted from disclosure based on section 552.105 of the Government Code. Section 552.105 excepts from required public disclosure information "relating to"

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

This exception protects a governmental body's planning and negotiating position with respect to particular transactions and its protection is therefore limited in duration. Open Records Decision No. 357 (1982). To show the applicability of section 552.105, a governmental body must first make a good faith determination that the release of information could damage its negotiating position with respect to the acquisition of property, subject to review by this office. Open Records Decision No. 564 (1990). Section 552.105(1) is generally inapplicable when the governmental body has publicly announced the project. Section 552.105(2) is generally inapplicable once the governmental body has entered into a final contract for the property at issue. Open Records Decision No. 222 (1979).

When section 552.105 is applicable, it protects not only information showing the location of property, appraisal reports specific to that property, and purchase price of the property, but also related information. Open Records Decision No. 564 (1990). However, you have not shown the applicability of section 552.105 to much of the submitted information. Nor have you informed us that the city intends to acquire each of the referenced parcels of land, since some of the transactions date back to 1997. See Open Records Decision No. 222 (1979) (applicability of exception ends upon governmental body's acquisition of property). To the extent you have met your burden, we have marked the documents that may be withheld under section 552.105.

For portions of the information for which you claimed the protection of sections 552.107 and 552.111, you also claim the protection of section 552.106(a). Section 552.106 protects drafts and working papers involved in the preparation and enactment of proposed legislation. Open Records Decision No. 429 (1985). The purpose of the exception is similar to that of section

552.111: to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body and to thereby protect the internal “deliberative” or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. Section 552.106 applies only to drafts and working papers prepared by persons with some official responsibility to prepare them for the legislative body. *Id.* We have reviewed the information you seek to withhold under section 552.106. We agree that the information relates to the “legislative process” and may be withheld.

We next consider whether any of the remaining information, for which you raised section 552.107, may be withheld under the claimed exception. Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney’s legal opinion or advice. Open Records Decision Nos. 589 at 1 (1991), 574 at 3 (1990), 462 at 9-11(1987). In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions. Open Records Decision No. 574 at 5 (1990). However, section 552.107(1) does not protect purely factual information unless the factual information constitutes a confidence that the client related to the attorney. *See id.* at 5. We have reviewed the records, submitted as Exhibit C, and agree that some of the documents, which we have tagged, is excepted from disclosure by section 552.107.

Section 552.108, the “law enforcement exception,” provides in relevant part as follows:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
 - (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
 - (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.

....

- (c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming an exception from disclosure under section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *Ex parte Pruitt*, 551 S.W. 2d 706 (Tex. 1977). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

The exception from disclosure under section 552.108 is discretionary and may be waived by the governmental body. Open Records Decision No. 177 (1977). *See also* Open Records Decision No. 586 (1991). In this instance, you state, in general terms, that the information requested related to "criminal activities in neighborhoods," however, you have failed to explain how this exception applies to the information at issue. Chapter 552 of the Government Code places on the custodian of public records the burden of establishing that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Based on the city's failure to meet its burden for the section 552.108 exception, we find that the city has not sustained its section 552.108 claim, and may not withhold any of the requested information under this exception.

You also claim that some of the requested information is excepted under section 552.109. Section 552.109 excepts "private correspondence or communications from an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy." Section 552.109 was designed to protect the privacy rights only of elected office holders, *see* Open Records Decision No. 473 (1987), and the common-law privacy test set out in *Industrial Foundation* should be applied, *see* Open Records Decision No. 506 (1988). You state that "the requested information includes medical information and other details, . . . , concerning the Councilmember." You have not specifically identified, nor were we able to discern, any information which constitutes private communications from an elected office holder. Therefore, we conclude that section 552.109 is inapplicable to the responsive information at issue in this request. Furthermore, to extent the submitted records contain "home address and social security number" such information may be covered by section 552.117.

We next address whether any of the submitted information must be withheld pursuant to section 552.110. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial

or financial information obtained from a person and privileged or confidential by statute or judicial decision. Section 552.110 is designed to protect third-party interests that have been recognized by the courts. *See* Open Records Decision No. 319 (1982). The information at issue does not consist of the type of information protected under section 552.110. Gov't Code § 552.002. Under the facts presented, we conclude that section 552.110 does not appear to be applicable to the submitted records. Therefore, the submitted records for which you raised section 552.110 may not be withheld under this exception.

You also assert that a portion of the requested information is excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Upon review of the records, we have tagged the information contained therein which reflects the policymaking processes of the city, and thus may be withheld from disclosure under section 552.111.

Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires the city to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). In this instance, if the individuals whose information is at issue have "requested that this information not be made available to the public," then such information must be withheld. You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 prior to the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision

No. 530 at 5 (1989). Accordingly, you must redact the information subject to section 552.117 wherever it is located in the submitted records.⁹

Finally, we note that although you have not raised any other applicable exception, based on the records at issue, we must consider whether some of the submitted information should be excepted from required public disclosure under section 552.130 of the Government Code.¹⁰ *See* Gov't Code § 552.352. Section 552.130 to the Open Records Act governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state;
or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Gov't Code § 552.130. Section 552.130 provides that information is excepted from disclosure if it relates to a motor vehicle title or registration issued by a state agency. This type of information may be released only as provided under chapter 730 of the Transportation Code. We have marked the type of information which must be withheld pursuant to section 552.130.

⁹We note that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

¹⁰The Office of the Attorney General will raise an exception on behalf of a governmental body when necessary to protect third-party interests. *See generally* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We are resolving this matter with an informal letter ruling rather than with a published open records decision.¹¹ This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive, flowing style. The first letter "S" is large and loops around the first part of the name.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 124941

cc: Ms. Kimberly Goad
D Magazine
1700 Commerce Street, 18th Floor
Dallas, Texas 75201
(w/o enclosures)

¹¹As a summary, we note that we have segregated the records between those which cannot be withheld and those which may be withheld. For the documents which may be withheld we have marked or tagged the information that can be withheld.